CEPATWAWASAN GROUP BHD & ANOR A

v.

TENGKU DATO' KAMAL IBNI SULTAN SIR ABU BAKAR & ORS B

HIGH COURT MALAYA, KUALA LUMPUR
BADARIAH SAHAMID JC
[CIVIL SUIT NO: D3-22-1168-2004]
19 DECEMBER 2007 C

CIVIL PROCEDURE: *Striking out - Plaintiff's appeal against striking out of claim against 14th-17th defendants - Claim for misappropriation of RM16 million through sham sale and purchase transactions after resignation as directors of plaintiff company - Whether sufficient material adduced to substantiate claim - Claim for entertainment expenses of RM287,914.64 during tenure as directors - Whether facts showed that expenses were authorised - Whether court not duty bound to determine whether expenses reasonable or extravagant* D

COMPANY LAW: *Directors - De facto or shadow directors - Whether there were directions or instructions in respect of management of company - Companies Act 1965, s. 4(1)* E

COMPANY LAW: *Directors - Company's claim for misappropriation of RM16 million through sham sale and purchase transactions after resignation as directors of plaintiff company - Whether sufficient material adduced to substantiate claim - Claim for entertainment expenses of RM287,914.64 during tenure as directors - Whether facts showed that expenses were authorised - Whether court not duty bound to determine whether expenses reasonable or extravagant* F

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This was the plaintiff companies' appeal against the decision of the Deputy Registrar allowing the 14th-17th defendants' application to strike out the plaintiff's claim against them under O. 18 r. 19(1)(b) of the Rules of the High Court 1980. The facts showed that the 14th-16th defendants were former directors of the plaintiff. They H resigned as directors of the plaintiff. The 17th defendant was the son of the 14th defendant. He was neither a director nor an employee of the plaintiff. The plaintiff claimed against the 14th-17th defendants for a misappropriation of RM16 million through the execution of sham sale and purchase transactions that were I entered into after the resignation of the 14th-16th defendants as directors of the plaintiff. The plaintiff alleged that the 14th-17th

A defendants breached fiduciary duties as *de facto* or shadow directors of the plaintiff at the material time. The plaintiff also claimed entertainment expenses of RM287,914.64 incurred by the 14th-16th defendants as being extravagant and wrongful and a breach of their fiduciary duties to the plaintiff during their tenure as B directors of the plaintiff.

Held (dismissing the plaintiff's appeal):

(1) The RM16 million alleged appropriated by the 14th-17th defendants were accounted for by parties other than the 14th-C 17th defendants. Moreover the plaintiff did not make the 14th-16th defendants parties to the action in its writ of seizure and sale obtained against the 1st-4th defendants and the 6th-11th defendants in respect of the same RM16 million. As such, the plaintiff could not pursue the same amount against D the 14th-17th defendants. (para 9)

(2) By virtue of s. 4(1) of the Companies Act 1965, a director is not necessarily defined by his designation as such but rather by the dominant or controlling role that he plays in the E running of the company. This encompasses a *de facto* as well as a shadow director who is "a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act." (paras 12 & 13)

F **(3)** Since the plaintiff's allegation was that the 14th-17th defendants acted as shadow or *de facto* directors of the plaintiff, it was necessary to consider the meaning of the two terms. While the terms *de facto* and shadow director have been used interchangeably, recent judicial pronouncements have G made a distinction between them. A *de facto* director though not validly appointed as such, purports or claims or holds himself out to be a director. On the other hand, a shadow director may but not necessarily in all cases act as a director but conceals or hides his role as such. Whether the two terms H are mutually exclusive or overlapping would depend on the particular facts and circumstances of each individual case. This is clearly a question of mixed fact and law. (paras 15, 16, 18, 19, 20 & 21)

I **(4)** There were no particulars of directions or instructions from the 14th-17th defendants to the *de jure* directors of the plaintiff in respect of the sham sale and purchase transaction that resulted in a RM16 million loss to the plaintiff. Neither was

there shown the *de jure* directors of the plaintiff at the material time adhering to the directions of the 14th-17th defendants in respect of the management of the company. There were also no particulars before the court indicative of the 14th-17th defendants purporting or holding themselves out to be *de facto* directors. (para 23)

(5) The evidence adduced by the plaintiff were disparate incidents involving various employees, inferences and perceptions that even if considered in totality, were insufficient to support the allegations of *de facto* or shadow directorship. A trial should not be used as a fishing expedition to elicit evidence, if any, of *de facto* or shadow directorship. (para 28)

(6) The plaintiff had provisions for entertainment expenses. The expenses incurred by the 14th-16th defendants were approved by authorised persons of the plaintiff. Therefore, it could be construed that the expenses were properly incurred. The court did not propose to investigate further whether they were extravagant or reasonable in the context of the particular business of the plaintiff. It could not be the duty of the courts to scrutinise invoices in order to determine what variety of entertainment were enjoyed and if it was related to the ordinary business of the company. Also, whether the expenses so incurred were reasonable or extravagant. It is the responsibility of corporations that provide for such expenses to ensure that there are mechanisms or procedures in place as safeguards to verify and approve or disapprove of such expenses. The courts should only go so far as to examine if company funds had been used for the purpose it was intended, and whether or not such expenses had been approved or authorised. To go any further would lead to the absurd situation of the courts descending into the 'marketplace', *ie*, the internal management of the company. (paras 37 & 39)

Case(s) referred to:

Affin Bank Bhd v. Eye Bee Sdn Bhd [2005] 7 MLJ 1 ***(refd)***

Australian Federal Court case of Ho v. Akai Pty Ltd (in LIQ) ACN 001 500 714 NSD 923 ***(refd)***

Australian Securities Commission v. AS Nominees [1995] 13 ACLC 1822 ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corp Bhd [1993] 2 AMR 34 ***(refd)***

A *Bishopgate-Investment Management Ltd v. Maxwell [1993] 11 ACLC 3128* ***(refd)***
Datuk Sahar Arpan v. PP [2007] 1 CLJ 326 CA ***(refd)***
Omega Holdings Sdn Bhd v. Dato' Tiah Thee Kian & Ors [2002] 7 CLJ 125 HC ***(refd)***
B *Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat & Ors [1999] 2 CLJ 886 HC* ***(refd)***
Re A Company (Ex parte Copp) [1989] BCLC 13 ***(refd)***
Re Hydrodam (Corby) Ltd [1994] 2 BCLC 180 ***(refd)***
Re Kaytech International plc [1999] BCC 390 ***(refd)***
Re Kong Thai Sawmill (Miri) Sdn Bhd, Kong Thai Sawmill (Miri) Sdn
C *Bhd & Ors v. Bing Leng Sung [1978] 2 MLJ 227* ***(refd)***
Re Lo-Line Electric Motors Ltd [1988] BCLC 698 ***(refd)***
Re Unisoft Group Ltd (No. 2) [1994] BCC 766 ***(refd)***
Secretary of State for Trade and Industry v. Deverell & Another [2001] Ch 340 ***(refd)***
D *Standard Chartered Bank of Australia Ltd v. Antico [1995] 13 ACLC 1381* ***(refd)***
Suppuletchimi v. Palmco Bina Sdn Bhd [1994] 2 CLJ 561 HC ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 4(1), 67, 132(1), 181(1), (2)
E Rules of the High Court 1980, O. 18 r. 19(1)(b), (c), (d)

Other source(s) referred to:
Walter Woon, *Company Law*, 3rd edn, 2005, p 309

For the plaintiff - Vincent Tan; M/s Gideon Tan Razali Zaini
F *For the 14th-17th defendants - Sunil Abraham; M/s Zul Rafique & Partners*

Reported by Usha Thiagarajah

JUDGMENT

G **Badariah Sahamid JC:**

[1] Enclosure 312 before me is the plaintiff's appeal against the decision of the Deputy Registrar on 21 February 2006 in allowing the 14-17th defendants' application (encl. 232) to strike out the plaintiff's amended statement of claim under O. 18 r. 19(1)(b) and/
H or (c) and/or (d) of the Rules of the High Court.

[2] The thrust of the plaintiff's appeal is that the plaintiff's claims against the 14-17th defendants raises issues worthy of consideration in a full trial and are not 'so plain and obviously
I unsustainable' that it warrants being struck off. The test of what is to be considered as 'plain and obviously unsustainable under O. 18 r. 19 of the Rules of the High Court are set out in the authorities below.

[3] The principles upon which the court acts in exercising its power under any of the four limbs of O. 18 r. 19 of the High Court are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule and the summary procedure can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable'. It cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or defence.

(*Bandar Builder Sdn. Bhd. & 2 Ors v. United Malayan Banking Corp. Bhd.* [1993] 2 AMR 34 at p. 37 Other Authorities – *Pet Far Eastern (M) Sdn. Bhd. v. Tay Young Huat & Ors.* [1999] 2 CLJ 886, *Affin Bank Bhd. v. Eye Bee Sdn. Bhd.* [2005] 7 MLJ 1, *Suppuletchimi v. Palmco Bina Sdn Bhd* [1994] 2 CLJ 561

Summary Of The Facts Of The Case

[4] The 14-16th defendants are former directors of the plaintiff. They resigned as directors of the plaintiff on 21 June 2004. The 17th defendant is the son of the 14th defendant. He was neither a director nor an employee of the plaintiff.

[5] The plaintiff's claim against the 14-17th defendants may be categorized under the following heads:

[6] Misappropriation Of RM16 Million

(i) A claim for RM16 million as the amount alleged to have been misappropriated by the 14-17th defendants through the execution of sham sale and purchase transactions. It is not disputed that these transactions were entered into after 21 June 2004 ie, after the resignation of the 14-16th defendants as directors of the plaintiff. However the defendant's alleged liability is premised on the 14-17th defendants' breach of fiduciary duties as 'shadow directors' and/or 'de facto' directors of the plaintiff at the material time.

Entertainment Expenses of RM287,914.64

[7] A claim of RM287,914.64 as the amount incurred as entertainment expenses by the 14th to the 16th defendants during the period of 14 February - 21 June 2004, ie during the tenancy of the 14-16th defendants as directors of the plaintiff. The plaintiff claims that the amount incurred is extravagant and wrongful and a breach of the defendants' fiduciary duties to the plaintiff.

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Grounds Of Judgment

[8] I have given careful consideration to the counsel written as well as oral submissions before me, as well as relevant authorities on the matter and guided by the abovementioned, have arrived at
B the following determination.

The Claim For RM16 Million

[9] The claim for RM16 million against the 14-17th defendants cannot be sustained for the following reasons:

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(i) The RM16 million alleged to have been misappropriated by the 14-17th defendants have been accounted for by parties other than the 14-17th defendants.

D

The 6th defendant, a director of the 5th defendant has admitted receiving RM13 million from the plaintiff pursuant to a sale and purchase agreement dated 2 July 2004 between the 2nd plaintiff and the 5th defendant. The 6th defendant has admitted that he had utilized RM10 million for investments in
E China, gave RM2 million to the 8th defendant for a palm oil project and spent the remaining RM1 million on gambling (encl. 130).

(ii) The plaintiff had obtained a writ of seizure and sale dated 24 June 2005 against the 1st - 4th defendants and 6-11th
F defendants in respect of the same RM16 million alleged to have been misappropriated by 14-16th defendants (encl. 296). The plaintiff did not make the 14-16th defendants parties in the above action. The plaintiff cannot now pursue the same amount abovementioned against the 14-17th defendants.

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(iii) There is insufficient material to substantiate the plaintiff's claim that the 14-17th defendants were de facto or 'shadow directors' of the plaintiff at the material time.

H **[10]** I will forthwith elaborate on the rationale of part (iii) above mentioned.

Were 14th-17th Defendants *De Facto* Or Shadow Directors?

Meaning of 'director'

I

[11] According to s. 4(1) of the Companies Act 1965;

> A 'director' includes any person occupying the position of director of a corporation by whatever name called and includes a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act and an alternate or substitute director.

[12] A director is not necessarily defined by his designation as such but rather by the dominant or controlling role that he plays in running the company. The above definition encompasses a *de facto* as well as a 'shadow director'.

[13] In a recent decision of the Court of Appeal, *Datuk Sahar Arpan v. PP* [2007] 1 CLJ 326 at p. 340, Justice Low Hop Bing, JCA opined:

> .... As a shadow director, he comes within the ambit and purview of the word "director" which is defined in s. 4(1) of the Companies Act 1965 as including "a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act". The Court of Appeal cited *Company Law* by Walter Woon 2nd edn, at pp. 222 and 223 as well as the English authority of *Re Hydrodam (Corby) Ltd.* [1994] 2 BCLC 180, 182. Although the Court of Appeal made no reference to the earlier case of *Omega Holdings Sdn. Bhd. v. Dato' Tiah Thee Kian and Ors* [2002] 7 CLJ 125, it is noteworthy that in the case abovementioned Justice Vincent Ng had taken the same position.

Common Elements Of *De Facto* And Shadow Directors

[14] From judicial pronouncements the following may be summarized as the essential elements to establish the existence of *de facto* and shadow directors.

(i) Person

He may be a natural or corporate person. Thus individuals, banks as well as corporations may be construed as 'shadow directors'.

In *Re A Company (Ex parte Copp)* [1989] BCLC 13, a bank was held liable as shadow director of a company on the grounds that the bank had used its position as debenture holders to play a controlling role in the affairs of the company. In the Australian case of *Standard Chartered Bank of Australia Ltd. v. Antico* [1995] 13 ACLC 1381, the court held a holding company liable as a shadow director of its subsidiary on the basis of the controlling role it exercised over the board of directors of its subsidiary.

A (ii) Directions or Instructions

He gives 'directions' and 'instructions' in relation to the company that can only be discharged by a director.

B What would amount to 'directions' and 'instructions' may be gleaned from the following authorities. In a recent Australian Federal Court case of *Ho v. Akai Pty Ltd* (in LIQ) ACN 001 500 714 NSD 923 of 2006., the Federal Court in outlining the well settled principles to establish shadow directorship stated:

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> .... the influence or control exercised by a shadow director may be strategic in character, defining the context in which, or conditions upon which, the company operates, or else contriving the transactions of significance to the company". (Affirming *Australian Securities Commission v. AS Nominees Ltd.* [1995] 133 ALR 1 at 52-53)

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While it is not necessary to show the existence of actual directions or instructions in order to constitute shadow directorship, there must be evidence of a controlling or

E commanding role exercised by the 'shadow director' over the *de jure* directors. (*Australian Securities Commission v. AS Nominees* [1995] 13 ACLC 1822 at 1838). The implications are that the *de jure* directors did not exercise any discretion or independent judgment but exhibited a pattern of acting in compliance with

F the directions of the shadow director. However, it is not necessary that such influence or control be exercised over the whole field of its corporate affairs. (*Secretary of State for Trade and Industry v. Deverell* [2001] Ch 340 at 350. Affirmed by the Federal Court of Australia in *Ho v. Akai Pty Ltd* (in LIQ)

G ACN 001 500 714 NSD 923 of 2006.

An interesting issue arises as to what is the degree of control or command that is required to make a person a *de facto* or shadow director? Does s. 4(1) require complete subservience

H to the *de facto* or shadow director or is compliance to the directions or instructions of the *de facto* or shadow director sufficient?

This issue was raised by Morrit LJ in *Deverell*'s case [2001] Ch

I 340 at 350. His Lordship rejected the requirement that the *de jure* directors be shown to have acted in a subservient role to the *de facto* or shadow director and cautioned against going beyond what is required by statute. According to his Lordship:

> ... It will, no doubt be sufficient to show that in the face of "directions or instructions" from the alleged shadow director the properly appointed directors or some of them cast themselves in a subservient role or surrendered their respective discretions. But I do not consider that it is necessary to do so in all cases. Such a requirement would be to put a gloss on the statutory requirement that the board are "accustomed to act" "in accordance with" such directions or instructions. It appears to me that Judge Cooke, in looking for the additional ingredient of a subservient role or the surrender of discretion by the board, imposed a qualification beyond that justified by the statutory language".

I would concur with the above view and submit that the lower threshold of compliance rather than subservience to the directions and instructions of the alleged shadow director is what is required under s. 4(1) of the Companies Act.

(iii) Accustomed to Act

There is a pattern established in that the 'instructions', or 'directions' of the shadow director is customarily adhered to by the *de jure* directors.

Judicial pronouncements shed light on the statutory requirement of directors being 'accustomed to act' on the directions or instructions of the shadow director.

Justice Low Hop Bing JCA in Datuk Sahar Arpan, referred to "the systematic participation of the accused in the affairs of the company". His Lordship also referred to *Re Unisoft Group Ltd. (No. 2)* [1994] BCC 766 per Harman J at p. 774-775 on the interpretation of the term shadow director and the meaning of the phrase "accustomed to act:

> those words can only mean .... that the shadow director must be, in effect the puppet master controlling the actions of the board. The directors must be (to use a different phrase) the 'cat's paw' of the shadow director. They must be people who act on the directions or instructions of the shadow director as a matter of regular practice. That last requirement follows from the reference in the subsection to the directors being 'accustomed to act'. That must refer to acts not on one individual occasion but over a period of time and as a regular course of conduct".

The above echoed the *dicta* of Millet J in *Re Lo-Line Electric Motors Ltd* [1988] BCLC 698 at 707:

> In order to establish that a person was a 'shadow director' as defined in s. 22(5) of the 1986 Act there had to be proof of a pattern of conduct in which a *de jure* director of a company was accustomed to act on the instructions or directions of the alleged shadow director and in order to establish that a person was a de facto director it was necessary to show that he undertook functions in relation to the company which could properly be discharged only by a director. The test for a shadow director was not satisfied if all that could be shown was that a de jure director acted on the instructions or directions of the alleged shadow director in relation to one event at the end of the company's life.

Thus to construe a person as a shadow or *de facto* director, there must be shown the existence of a 'pattern' or 'custom' in which the shadow or *de facto* directors plays a controlling role over the *de jure* directors in respect of the management of the company.

Distinction Between *De Facto* And Shadow Director

[15] Since the plaintiffs allegation is that the 14-17th defendants had acted as shadow or *de facto* directors of the plaintiff, it is necessary to consider the meaning of the two terms.

[16] While on occasion the terms *de facto* and shadow director have been used interchangeably, recent judicial pronouncements have made a distinction between them in the following terms.

[17] In the case of *Re Hydrodam (Corby) Ltd.* [1994] 2 BCLC 180 at 183 Millet J distinguished between *de facto* and shadow directors in the following terms:

> The terms do not overlap. They are alternatives and in most and perhaps all cases are mutually exclusive. A *de facto* director is a person who assumes to act as a director. He is held out as a director by the company, and claims and purports to be a director, although never actually or validly appointed as such. To establish that a person was a *de facto* director of a company it is necessary to plead and prove that he undertook functions in relation to the company which could properly be discharged only by a director. It is not sufficient to show that he was concerned in the management of the company's affairs or undertook tasks in relation to its business which can properly be performed by a manager below board level. A *de facto* director, I repeat, is one who claims to act and purports to act as a director, although not validly appointed as such. A shadow director, by contrast, does

> not claim or purport to act as a director. On the contrary, he claims not to be a director. He lurks in the shadows, sheltering behind others who, he claims, are the only directors of the company to the exclusion of himself. He is not held out as a director of the company'.

[18] It would seem from the above that what may distinguish a *de facto* from a shadow director is that a *de facto* director though not validly appointed as such, purports or claims or holds himself out to be a director. On the other hand, a shadow director may, but not necessarily in all cases acts as a director, but conceals or hides his role as such.

[19] While Millet J in *Re Hydrodam (Corby) Ltd.* appears to draw a distinction between the two concepts, there is recent judicial *dicta* that the two terms are not mutually exclusive and it is possible that a person conducts himself in a mixture of both (*Re Kaytech International plc* [1999] BCC 390).

[20] In my opinion, whether the two terms are mutually exclusive or overlap would depend on the particular facts and circumstances of each individual case.

Evidential Burden

[21] It is clear that the issue of whether or not a person is a *de facto* or shadow director is clearly a question of mixed fact and law. (*Datuk Sahar Arpan v. PP* [2007] 1 CLJ 326, at p. 337). The question to be asked may be summarized as follows:

> Have the Plaintiffs succeeded in establishing the essential elements of *de facto* or and shadow directorship as required by s. 4(1) of the Companies Act? Or to put in another way, have the Plaintiff adduced sufficient evidence to demonstrate that the 14-17th defendants had given instructions or directions discharged in the capacity of directors and that those directions or instructions were shown to have been customarily complied with by the de jure directors?

[22] The plaintiff had sought to prove their allegations of the *de facto* or shadow directorship of the 14th to the 16th defendants by tendering to the court *inter alia* the following particulars:

A (i) The sham sale and purchase agreement was entered into on 2 July 2004, a mere 11 days after the resignation of the 14-16th defendants as directors, drawing an inference that the 14-16th defendants must have played a dominant role in its planning and execution;

B (ii) The 'suspicious' movement of funds around the material time, (no details were given as to why they were 'suspicious');

(iii) At the material time an unusual amount of documents were shredded, inferring that the 14 -17th defendants were involved C in some wrongdoing and were disposing of the evidence;

(iv) Certain employees were approached and asked to resign from their posts, allegedly on the instructions of the 14-17th defendants;

D (v) Certain *de jure* directors had been appointed as directors by the 14-16th defendants, inferring that they were under the control of the 14-16th defendants;

E (vi) The 17th defendant had inquired and was 'consistently informed of the factory operations and production figures' after the resignation of the 14-16th defendants; and

(vii) Testimonies of various employees that they continue to regard the 14-16th defendants as their 'bosses' post-resignation.

F **[23]** There were no particulars of directions or instructions from the 14-17th defendants to the *de jure* directors in respect of the sham sale and purchase transaction that had resulted in a RM16 million loss to the plaintiffs. Neither is there shown to be a pattern G of the *de jure* directors of the plaintiff at the material time adhering to the directions of the 14-17th defendants in respect of the management of the company. There were also no particulars before me indicative of the 14-17th defendants purporting or holding themselves out to be *de facto* directors. In my opinion H what has been adduced falls far short of the necessary elements that establish the 14-17th defendants as *de facto* or of 'shadow directors. The particulars put before me relate to matters that are primarily inferential or circumstantial. The testimonies of employees with respect to the role perceived to be played by the 14-16th I defendants are irrelevant. In any case, at most, what the testimonies indicate is a lingering sense of the omnipresence of the defendant in the administration of the company by certain employees of the plaintiff.

[24] The plaintiff acknowledges the lack of evidence to substantiate their claim and submits that it is precisely in the nature of 'shadow directors' that they act as it were 'behind the scenes', in covert and surreptitious ways, and that evidence of shadow directorship can only be brought to light by the testimonies of witnesses in a full trial. The plaintiff counsel referred the court to the case of *Omega Holdings Sdn. Bhd. v. Dato' Tiah Thee Kian and Ors* [2002] 7 CLJ 125 to substantiate the above stand.

[25] I do not disagree with the principle laid down in the above case where Justice Vincent Ng held:

> It was not appropriate to summarily strike out the plaintiff's claim because the very question of whether the first defendant was a shadow director of the plaintiff and Omega Securities (as contended by the plaintiff) was a question to be tried and determined through a discovery process or cross examination of the witnesses.

[26] Certainly, if there are sufficiently clear evidence that parties alleged to be *de facto* or shadow directors had played a controlling role, the court would not hesitate to move for a trial in order to unveil further particulars. The facts in the *Omega Holdings* case bears this out. The plaintiff brought an action against its former director, the 1st defendant, one named Tony Tiah, for breach of fiduciary duty owed by the 1st defendant to the plaintiff, in his role in fraudulently implementing an elaborate scheme which caused Omega Securities to give financial assistance to purchase the plaintiff's shares in contravention of s. 67 of the Companies Act. Justice Vincent Ng referred to averments that the 1st defendant, had himself represented and held out that he had control of over 90% of the plaintiff's shareholdings. There was also a pending criminal case against the 1st defendant based on the same transaction. There was therefore sufficient credible evidence of a *de facto* or shadow directorship to warrant a trial.

[27] Similarly, in the *Secretary of State for Trade and Industry v. Deverell and Another* [2001] Ch 340, the English Court of Appeal found clear and cogent evidence that the defendant was indeed a shadow director, although he was designated as a 'consultant'. On the facts, he had entered into negotiations on behalf of the company; played a prominent role in the management of the company's affairs; there was also evidence that he 'bossed' the directors who customarily submitted to his requirements.

[28] Such is not the case here. The evidence adduced in the instant case are comprised primarily of disparate incidents involving various employees, inferences and perceptions, that even considered in totality are clearly insufficient to support the allegations of *de facto* or shadow directorship, and a trial may not be used as a 'fishing expedition' to elicit evidence, if any of *de facto* or shadow directorship. I therefore find the above claim against the 14-17th defendants unsustainable.

The Claim For Entertainment Expenses

[29] The claim for RM287,914.64 as entertainment expenses incurred by the 14-16th defendants from February - May 2004 cannot be sustained for the following reasons.

[30] The contention of the plaintiff is that the claims were wrongful as they were extravagant and could not be shown to be linked to the primary business of the plaintiff *viz* oil palm.

[31] The plaintiff contends that the invoices for the abovementioned expenses relate to food and beverage at restaurants, nightclubs as well as for services of Guest Relations Officers and such expenses are very far removed from the ordinary business of the plaintiff.

[32] Thus the 14-16th defendants had breached their fiduciary duties as directors to act *bona fide* in the interests of the company and to exercise their powers for their proper purpose.

(Section 132(1) of the Companies Act 1965; Walter Woon on *Company Law*, 3rd edn. 2005 at p. 309)

[33] It is not disputed that the invoices for the above expenses had been verified and duly paid by the plaintiff's accounts executives, the officers authorized with the task. The plaintiff's argument is that the officer who verified and approved the reimbursement of the expenses was a subordinate of the 14-16th defendants who were directors. He was therefore not in a position to query or refuse the payment of such expenses even if they were extravagant or wrongful. The approval of such expenses, it was claimed was therefore not indicative that such expenses were reasonable or had not been improperly incurred by the 14-16th defendants.

[34] From the authorities it is clear that in order to succeed the plaintiff must demonstrate that the 14-16th defendants had acted for an improper purpose, or that they had used company funds for an improper purpose. *Bishopgate-Investment Management Ltd. v. Maxwell* [1993] 11 ACLC 3128.

[35] The expenses incurred by the 14-16th defendants were incurred for the purpose for which they were intended ie, for 'entertainment'. The invoices were for food and beverage at restaurants, nightclubs as well as the services of Guest Relations Officers. Such expenses clearly fall within the broad category of 'entertainment'. In my opinion, company funds had therefore been used for the intended purpose.

[36] The plaintiff's additional argument is that they were improperly incurred because the amount spent was firstly, extravagant and secondly, was not shown to be related to the primary business of the plaintiff *viz.* oil palm.

[37] The question that comes to mind is this: How far should courts go in investigating whether the amount claimed to have been incurred as 'entertainment expenses' were reasonably incurred and in the ordinary course of the relevant business? I am of the opinion that it cannot be the duty of the courts to scrutinize invoices in order to determine what variety of entertainment had been enjoyed and if it was related to the ordinary business of the company, as well as whether the expenses so incurred are reasonable or extravagant. It is the responsibility of corporations which provide for such expenses to ensure that there are mechanisms or procedures in place as safeguards to verify and approve or disapprove such expenses. In my opinion the courts should only go so far as to examine if company funds had been used for the purpose it was intended or improperly, and whether or not such expenses had been approved or authorized. To go any further would lead to the absurd situation of the courts descending into the 'marketplace' ie the internal management of the company. It cannot be the duty of the courts to engage in an examination of the 'who, what, when, where, whys' of such expenses. And certainly courts are not equipped and should not be called upon to determine what may or may not be construed as reasonable entertainment expenses, and whether such expenses relate to the 'ordinary business' of an infinite variety of business of corporations.

[38] The case of *Re Kong Thai Sawmill (Miri) Sdn. Bhd., Kong Thai Sawmill (Miri) Sdn. Bhd. & Ors v. Bing Leng Sung* [1978] 2 MLJ 227, lends some support to the above stand. The appellant company is a private company incorporated with the main business of extracting timber in Sarawak. In this case the minority shareholders of the appellant company brought an action under s. 181(1) & (2) of the Companies Act 1965 alleging, *inter alia* the misuse of company funds relating to various transactions, among them the purchase and outfitting of a motor yacht named Berjaya Malaysia. The hulk of a vessel had been purchased for RM48,000 and then reconstructed as a yacht at a cost of RM505,698. The running expenses of the yacht, charged to the company, were RM189,028 in 1968/1969 and RM95, 910 in 1969/70. The purchase had been validated by resolution of the company. The trial judge took the view that the expenditure was authorized and impliedly that it was a matter for their discretion. The Federal Court took the opposite view. On appeal, the Privy Council, agreed with the trial judge. Lord Wilberforce said:

> These transactions may be criticized. The belief that possession of a yacht and the use of it for entertainment promotes the Company's interests may fail to convince: the originally intended use of the yacht-for visiting Niah, a place inaccessible by ordinary means-did not materialize: the use of it by Directors .... might not appeal to shareholders. But these were all matters for decision by the members of the Company, and if they chose to approve expenditure of doubtful value and even a degree of extravagance that was their choice.

[39] In the instant case, the plaintiff company had made provisions for entertainment expenses; the 14-16th defendants had incurred the expenses on entertainment, and such expenses had been duly approved by the authorized persons. Thus it can be construed that they had been properly incurred. I do not propose to investigate further whether they were extravagant or reasonable in the context of the particular business of the plaintiff, for the reasons I have alluded to above.

[40] For the reasons stated above, I uphold the Deputy Registrar's decision in allowing the 14-17th defendants' application to strike out the plaintiff's amended statement of claim under O. 18 r. 19(1)(a) of the Rules of the High Court 1980. Enclosure 312 is dismissed with costs.